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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 566

LOUIS MITCHELL, RALPH LIPSCOMB, JACK CROWLEY, FRED PETERS, CARL PHILLIPS MAUS, BABE W. BOWMAN, KENNETH OLSON, CLAYTON CASH, ARLING MARTYN, HERBERT STOWE, JOHN PEARSON SMITH, JR., SONNY DAWSON,

Petitioners,

vs.

WHITE CONSOLIDATED, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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I.

Under the superficial appearance of sustaining a motion to dismiss petitioners' amended complaint, the Court of Appeals has in fact violated their constitutional right to have a *jury* determine the *fact* question of what was the proximate cause of their injuries. This violation *masquerades* under the appearance of a mere procedural decision. Actually it is a more arbitrary violation than a directed verdict would be. *It cuts off the right at the threshold of the case*..10-12

II.

This violation was done *by means* of distorting Rule 8(a) and (e) of Civil Procedure and engrafting "added" requirements of Indiana law upon the Rule, and then dismissing petitioners' amended complaint for supposed failure to meet these "added" requirements (Tr. 71-74). While less serious than the basic violation of the right to obtain a jury trial of the fact questions,—this

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IN THE

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OCTOBER TERM, 1949.

No.

LOUIS MITCHELL, RALPH LIPSCOMB, JACK CROWLEY, FRED PETERS, CARL PHILLIPS MAUS, BABE W. BOWMAN, KENNETH OLSON, CLAYTON CASH, ARLING MARTYN, HERBERT STOWE, JOHN PEARSON SMITH, JR., SONNY DAWSON,

Petitioners,

VS.

WHITE CONSOLIDATED, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE MATTER INVOLVED.

The opinion below (Tr. 68) is published as:

Mitchell et al v. *White Consolidated, Inc.*, 177 F. 2d 500.

This is the second time these twelve personal injury plaintiffs have had to come to this Court in their struggle to obtain a jury trial of this case.

They filed a consolidated amended complaint which plainly meets the simple requirements of stating a personal injury claim under the Rules of Civil Procedure.

It alleges statutory negligence (Tr. 9), proximate cause and damage (Tr. 26 top). Nevertheless, the District Court sustained defendant's motion to dismiss for failure to state a claim (Tr. 27, 29) and they appealed (Tr. 29, 30).

The Court of Appeals denied the plaintiffs a hearing the first time, by sustaining defendant's motion to dismiss their appeal on the ground that the appeal was not filed in time (Tr. 56). The appeal had been taken during the transition period between the old ninety-day rule and the new thirty-day rule and they had proceeded under the old rule. They petitioned for certiorari (No. 599, October Term, 1948) and showed this Court that the Court of Appeals had failed to perform its duty under Amended Rule 86 (b) by *refusing to consider* whether application of the new thirty-day rule would work an injustice to them (Tr. 56).

This Court granted a summary reversal upon the petition for certiorari, without bringing up the case, and ordered the Court of Appeals to discharge its duty under Amended Rule 86(b), (Tr. 62, top):

> *Mitchell et al.* v. *White Consolidated, Inc.*, 336 U. S. 958, 69 S. Ct. 889

After the case went back, the Court of Appeals made an order for the parties to brief and argue the case on the dismissal question under Amended Rule 86(b) and also on the merits at the same time, (Tr. 66), which was done. The court then rendered an opinion (Tr. 68-74) holding that application of the new thirty-day rule would work injustice to these appellants and that accordingly the appeal was timely filed, (Tr. 69), ***thereby admitting that the Court of Appeals had done an injustice to these plaintiffs the first time which was only cured by the intervention of the Supreme Court.***

But the opinion then went on to *reach the result* of again throwing these men out of court, by holding that the District Court properly dismissed their amended complaint for a supposed technical failure to properly allege *proximate cause* (Tr. 71-74).

If these twelve injured men are not to be denied their day in court, *it is important for this Court to scrutinize that opinion.* Superficially, it appears to be merely a ruling on the sufficiency of the amended complaint. Actually, *it invades the province of the jury* on proximate cause, and *distorts the Rules of Civil Procedure,* to such an extent that it amounts to a miscarriage of justice and also sets a bad precedent.

As this Court will see by glancing through the opinion (Tr. 70-74), it is difficult to follow its logic because it *contradicts* itself several times, and *shifts its ground,* in the manner characteristic of arguments which attempt to justify a *pre-determined conclusion.* To demonstrate this, it may be helpful to state the issues briefly:

The amended complaint alleges that these twelve plaintiffs were passengers on a bus going south on a public street which had a line of trolley poles down the middle of the street. The defendant was a road paving contractor, having a contract to re-surface the entire width of the street, but was only working on the west side of the street, leaving the east side open for two-way travel. The contractor erected a *barricade* at the north end of his work. When this bus reached the barricade on a dark and rainy night, its driver was required to turn suddenly to the left to go around the barricade and ran into a trolley pole a short distance southward in the middle of the street. The twelve plaintiffs were injured in that collision (Tr. 8-26).

The amended complaint shows that there were *two* distinct acts of negligence at the scene of the collision. The first was *not* the fault of the defendant-contractor. The second *was* its fault. They are:

(1) The trolley *pole* was the property of the *street railway company*, a stranger to this case, and that company negligently failed to paint the pole or have a light on the pole so as to warn motorists of its presence.

(2) The *barricade* was erected by the *defendant contractor*. Defendant was guilty of *statutory negligence* in failing to comply with an Indiana statute requiring that when a contractor barricades a street he must display a *red light* at or near the barricade (Tr. 9).

The amended complaint contained a plain direct charge of this statutory negligence which the opinion admits is a sufficient charge of negligence (Tr. 71). The Court of Appeals, in an earlier case by a different plaintiff had held that this contractor was not liable for the first act of negligence above described,—failure to give warning of the existence of the trolley *pole* (Tr. 71), but the present opinion *admits* that the amended complaint of these plaintiffs contains a *different* and *good* charge of negligence based on the contractor's *own* statutory duty to place a *red light* at his *own barricade*. The opinion admits, and the defendant admitted, that under Indiana law this violation of the statute "constitutes negligence *per se*" (Tr. 71).

Since the amended complaint admittedly alleges statutory negligence per se, one would suppose that the question of alleging *proximate cause* would give the Court of Appeals little trouble, as against a motion to dismiss

for failure to state a claim, in view of the simple requirements of the Rules of Civil Procedure and in view of the following positive and direct allegation of ultimate fact in the amended complaint:

> "That all of the said injuries to each of the said plaintiffs *is the proximate result* of *each* and all the acts of negligence of the defendant to the damage of each of said plaintiffs in the sum of: * * *"
> (Our italics)
> Tr. 26, top

But the opinion goes ahead with an involved and self-contradictory *argument* on the subject of proximate cause, designed to show that somehow the sole proximate cause of the accident must have been the street railway company's failure to give warning of its pole and not the contractor's statutory negligence. The opinion winds up with the amazing conclusion that this amended complaint was properly dismissed for failure to allege proximate cause, *notwithstanding the above-quoted* positive and direct allegation on the subject (Tr. 73-74). This argument, in which the opinion indulges, might be proper for the defendant's lawyer to make to the jury at the trial, but these petitioners respectfully urge that it has no place in the Court of Appeals' opinion construing the sufficiency of the amended complaint as against a motion to dismiss, under the Rules of Civil Procedure (Tr. 73-74). An analysis of the self-contradictions in the opinion will be made later in this petition at pages 19-21.

A misleading feature of the opinion is that it attempts to by-pass and toss aside the above-quoted direct allegation of proximate cause (Tr. 26 top) by making an incomplete quotation of it and *belittling* it as a "conclusion" (Tr. 71 top). The opinion never again mentions this crucial allegation of proximate cause but goes ahead

with the court's argument on the subject. In the course of that argument the opinion quotes an excerpt from another part of the amended complaint (Tr. 12) which states two *alternative* causes of the accident, namely, lack of warning devices on the pole "*or* without any warning signs or *red lights* warning him of danger ahead" (Tr. 73). The opinion then distorts and misconstrues this excerpt as an *admission* that the sole cause was "because the trolley pole was unpainted, unlighted and wholly devoid of any warning devices" (Tr. 73-74). For this supposed admission, the opinion throws out the amended complaint (Tr. 74). Thus, having belittled and ignored one direct allegation of proximate cause (Tr. 26 top, Tr. 71 top) in violation of Rule 8(a) and 8(e)(1) of Civil Procedure, the opinion then goes on to use an *alternative* allegation of proximate cause to destroy the first (Tr. 73-74) in plain violation of Rule 8(e)(2).

Another misleading feature of the opinion is its vague implication that a question of Indiana statutory construction is involved (Tr. 72-73). *No question of statutory construction is involved.* The complaint merely charges that the defendant did not display the statutory red light (Tr. 9, par. a). The opinion concedes that this omission is negligence per se and states that the defendant concedes it also (Tr. 71). The opinion says the only question in the case is whether this admitted statutory negligence is "shown" to be the proximate cause of the injury (Tr. 71).

If allowed a jury trial by the grace of this Court's intervention, these plaintiffs expect to *prove* their direct allegation of proximate cause (Tr. 26 top) by testimony and circumstantial evidence to "show" the *jury* that if the defendant had placed the *statutory red light* at its

barricade, it would have conveyed to the bus driver a warning and knowledge of *general peril* existing in that vicinity and in the path into which he was turning so that he *would have exercised greater vigilance* and *would have discovered and avoided* hitting the trolley pole *notwithstanding* the failure of the street railway company to give warning of the pole.

Plaintiffs expect to show by evidence and argue to the jury that the statutory red light, which the defendant omitted, is in fact a *stronger* and *different kind* of warning of peril than the yellow bomb torches which defendant did use,—that *in fact* such a red light is generally used to convey to the average motorist (including the driver of plaintiffs' bus) the warning "look out for *serious surrounding peril* in this situation," while the yellow bomb torch is generally used to convey only the lesser warning "go around this particular spot."

But these plaintiffs have been cut off and *deprived of presenting the above fact questions to a jury* because the Court of Appeals' opinion adopts the extraordinary doctrine that the plaintiffs must "show" to the *court* in their amended *complaint* that the defendant's omission of the red light *was* in *fact* the proximate cause of the accident (bottom of Tr. 71 to top of 72). Since the complaint does directly state the fact of proximate cause (Tr. 26 top), this opinion requires these plaintiffs to do *more*. It actually requires them to *convince the Court of Appeals* of the *fact* that absence of the red light caused the accident, *before* that court will let them submit that fact question to a jury. This is plainly demonstrated by the fact that the opinion engages in a *factual argument* against the plaintiffs in which the court tries to "show" that the trolley *pole* and not the lack of the red light was the sole cause of the accident (Tr. 73-74).

This is the plaintiffs' last chance for a jury trial, or for any remedy for their injuries, because the District Court dismissed with prejudice (Tr. 29 and Rule 41(b) of Civil Procedure). Moreover, the two year Indiana statute of limitations has run against them (Tr. 8, 9) during their long struggle to get a trial in the District Court and a hearing of their appeal in the Court of Appeals.

Basis of This Court's Jurisdiction.

This Court's jurisdiction is invoked under 28 U. S. Code 1254, allowing petitions for certiorari generally to courts of appeals, and 28 U. S. Code 2101 (c) allowing such petitions to be filed within ninety days after judgment below. Judgment was entered by the Court of Appeals November 1, 1948 (Tr. 75), and this petition is filed within ninety days thereafter.

QUESTIONS PRESENTED.

(1)

Has the Court of Appeals set itself up as a jury, and usurped the functions of the jury, in determining what *in fact* was or was not the proximate cause of these petitioners-plaintiffs' injuries?

Have these petitioners-plaintiffs *been denied their constitutional right to a jury trial,* by the action of the courts below in disregarding their plain allegation of proximate cause in their amended complaint (Tr. 26 top) and dismissing their amended complaint (Tr. 29) on the argumentative ground that the plaintiffs have failed to "show" the *court* that a "causal relationship" exists between defendant's admitted negligence and their injury? (Tr. 73-74).

Who has to be "shown" and convinced of the *fact* of "causal relationship" in the *first* place,—the jury or the Court of Appeals?

Must these plaintiffs *try* their questions of fact in the Court of Appeals and *convince* that *court* that a "causal relationship" exists in fact as a *prerequisite* to obtaining a jury trial below?

(2)

Has the Court of Appeals distorted the Rules of Civil Procedure as the means of invading the province of the jury?

(a) Did the Court of Appeals err in holding that the method of pleading proximate cause in a complaint in the federal court is a "substantive requirement" governed by Indiana law (Tr. 71 bottom, Tr. 72 top)?

(b) Did the Court of Appeals err in applying the old test of Indiana Code pleading, that the complaint must state a good "cause of action", instead of the requirement of Rule 8 of Civil Procedure that it is sufficient to "set forth a claim for relief" which "shall be simple, concise and direct"? (Tr. 72 top).

When petitioner's amended complaint made the simple, concise and direct allegation of proximate cause "that all of the said injuries to each of the said plaintiffs *is the proximate result* of each and all the acts of negligence of the defendant to the damage of each of said plaintiffs" (Tr. 26), was the complaint required to go further and allege evidence, inferences and argument to "show" to the *court* that there was *in fact* a "causal relationship" between the negli-

gence and injury, in order to prevent the court from dismissing the amended complaint (top of Tr. 72, 73)!

(c) When the opinion at Tr. 73-74 seeks to destroy the above-quoted direct allegation of proximate cause (Tr. 26) by quoting an *alternative* and supposedly *inconsistent* allegation of proximate cause contained in another part of the amended complaint (Tr. 12), does the court violate Rule 8(e) of Civil Procedure which expressly authorizes these plaintiffs to "set forth two or more statements of a claim *alternatively* or hypothetically, either in one count or in separate counts" and which further provides that "when two or more statements are made in the alternative and one of them if made independently would be sufficient, *the pleading is not made insufficient* by the insufficiency of one or more of the alternative statements."?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Summary.

I.

The Court of Appeals' opinion and decision invades the province of the jury, and invites other courts to do likewise unless corrected by this Court, by the dangerous device of having the court set itself up as a preliminary fact finder which scrutinizes the story of the accident as told in the complaint to see if the *court* can *find* a "causal relationship" between the negligence and the injury. Then the court throws out the amended complaint because *"we find* no such causal relationship in the averments of the complaint" (Tr. 72 top) notwithstanding the plain direct allegations of proximate cause

in the amended complaint (Tr. 26). The opinion erroneously and unfairly pushes aside this allegation of proximate cause as a "conclusion" (Tr. 71 top), and then goes ahead and *argues the facts* of the accident from the *court's viewpoint* (Tr. 73-74).

This is a more subtle and dangerous invasion of the province of the jury than would be a directed verdict on the same subject, because the invasion *masquerades* as a routine and harmless decision on the sufficiency of a complaint. In the first case cited, *infra*, this Court recently had occasion to prevent such an invasion of the right to a jury trial under the Seventh Amendment, by the action of a district court dismissing a complaint, which was affirmed by the Court of Appeals and reversed by this Court. The invasion was less arbitrary in that case because the dismissal occurred at the close of plaintiff's evidence, whereas here the plaintiff was not even permitted to obtain an answer from the defendant or go to trial.

Jacob v. *City of New York* (1942), 315 U. S. 752, 753, 756; 62 S. Ct. 854, 856

Wilkerson v. *McCarthy* (1949), 336 U. S. 53, 55, 62-64, 69 S. Ct. 413, 414, 418

Baylis v. *Travelers Ins. Co.* (1885), 113 U.S. 316 (end of opinion), 5 S. Ct. 494, 497

Specifically, this court has long held that proximate cause is not a question of *law* to be determined by the court but a question of *fact* for the jury, and the same is held in other circuits.

Milwaukee & St. Paul Ry. Co. v. *Kellogg* (1876), 94 U. S. 469, 474, 24 L. Ed. 256, 259

Story Parchment Co. v. *Patterson Paper Parchment Co.* (1931), 282 U. S. 555, 566, 51 S. Ct. 248, 251-252

Louisiana Farmers Protective Union v. *Great A. & P. Co.* (8 Cir., 1942) 131 F. 2d 419, 423, pars. 8-10

Atlantic Greyhound Corp. v. *Lyon* (4 Cir. 1939) 107 F. 2d 157, certiorari denied, 309 U. S. 667

A related error, less serious than the above violation of the Seventh Amendment but still warranting this Court's attention, is the fact that when the Court of Appeals conducted this factual inquisition and argument of the facts on the motion to dismiss the complaint, it violated the principle that the only stage and the only manner in which a Court of Appeals can review the facts in a jury case is after a ruling on a motion for a directed verdict at the close of the evidence and on an appeal therefrom.

Minnahaha County v. *Kelley* (8 Cir. 1945), 150 F. 2d 356, 359, par. 8

II.

This invasion of the province of the jury was accomplished *by means* of perverting and distorting the Rules of Civil Procedure in each of the respects stated, *infra*. While a procedural question, as such, might not merit this Court's attention, it does *when it has been used as a vehicle for the invasion of more fundamental rights* and when, if allowed to stand, it will serve as an invitation for such perversion of the practice in the future.

A.

Stripped of all surplusage and alternative allegations, the amended complaint plainly and directly alleged statutory negligence (Tr. 9), proximate cause and damage

Tr. 26). This meets the simple requirements of Rule 8(a) and (e) and also Form 9 appended to the Rules of Civil Procedure.

Leimer v. *State Mutual Life Assurance Co.*, (8 Cir. 1940) 108 F. 2d, 302, 305-306, par. 7-8

Sparks v. *England*, (8 Cir. 1940) 113 F. 2d 579, 581-582, pars. 1, 2 and 9

Mails v. *Kansas City Public Service Co.*, (D.C. W.D. Mo. 1943) 51 F. Supp. 562, 564, 565 pars. 2 and 4

Watson v. *World of Mirth Shows*, ((D.C. S.D. Ga. 1944) 4 F.R.D. 31, 32, par. 1

B.

The Court of Appeals misapplied the doctrine of *Erie R. Co.* v. *Tompkins* (1938) 304 U.S. 64, by holding that the requisites of *pleading* proximate cause in a complaint in the federal court is a matter of "substantive" law, after which the opinion requires the complaint to state a "good cause of action" which is the requirement of Indiana code pleading (bottom of Tr. 71, top of Tr. 72). While the substantive *duty* of a defendant to refrain from negligently injuring a plaintiff is a matter of substantative law under *Erie R. Co.* v. *Tompkins* (304 U.S. at p. 70), it is a serious error to hold that the *procedural* question of how negligence and proximate cause should be pleaded in order to withstand a motion to dismiss, and whether contradictory allegations make the complaint subject to a motion to dismiss, is a matter of substantive law. *This ruling, if allowed to stand, will place most questions of pleading in the federal courts back under the requirements of state practice,* as they were under the Conformity Act prior to the rules of civil procedure.

Hannah v. *Gulf Power Co.*, (5 Cir. 1942) 128 F. 2d, 930, 931, par. 1

Swift & Co. v. *Young*, (4 Cir. 1939) 107 F. 2d, 170, 172, par. 4

New York Life Ins. Co. v. *Sparkman*, (5 Cir. 1939) 101 F. 2d 484, 485, par. 1.

Part of the same error is the ruling that this amended complaint must meet the requirements of stating a good "cause of action" (Tr. 72, top) in order to withstand this motion to dismiss. That is the requirement of Indiana code pleading for a complaint to withstand a demurrer (Sec. 2-1107, Burns Ind. Sts. 1933) and *the opinion relies entirely on Indiana cases.* However, this common code phrase, with its accumulated burden of technical case law construing it, was designedly avoided in Rule 8(a) and (e) of Civil Procedure which merely requires the complaint to "set forth a claim for relief" which "shall be simple, concise and direct" and which permits alternative allegations 'regardless of consistency". Many courts have expressly repudiated the "cause of action" test stated in the present opinion (Tr. 72, top).

Dioguardi v. *During*, (2 Cir. 1944) 139 F. 2d 74, 75, par. 1

Wright v. *Rush*, (10 Cir. 1940) 115 F. 2d 265, 268, par. 8

Camrel Co. v. *Skouras Theatres Corp.* (D.C. N.J. 1944) 57 F. Supp. 811, 812, par. 1 and cases cited

In re: Stroh (D.C.M.D. Pa. 1943) 52 F. Supp. 958, 961, par. 4

Mortensen v. *Chicago etc. Ry. Co.* (D.C.S.D. Ia. 1941) 2 F.R.D. 121, par. 2.

C.

The opinion erroneously and unjustly takes plaintiff's direct allegation of proximate cause (Tr. 26) and tosses it aside as a "conclusion" (Tr. 71, top), after which the opinion seizes upon and *alternative* allegation of proximate cause in another part of the amended complaint (Tr. 12) which the court construes (erroneously) as being in conflict with the other allegation of proximate cause (Tr. 73). Then the opinion uses this alternative allegation as a ground for *destroying* the *other* direct allegation of proximate cause, and proceeds to hold the amended complaint insufficient for failure to "show" proximate cause. This is a direct violation of plaintiffs' right granted by this Court's Rule 8(e) which provides that "a party may set forth two or more statements of a claim • • • alternatively • • •in one count. When two or more statements are made in the alternative and one of them if made independently would be insufficient, *the pleading is not made insufficient by the insufficiency of the one or more alternative statements*".

Rule 8(e) of Civil Procedure.

D.

If the Indiana law did govern, the amended complaint would be good under Indiana law, and the Court of Appeals would have mis-applied and denied these plaintiffs the benefit of the law of their state. The Indiana cases cited in the opinion (Tr. 72, 73), do not sustain it. (*Baltimore etc. R. Co.* v. *Burtsch*, 192 Ind. 199; *Indianapolis Abbattoir Co.* v. *Neidlinger*, 174 Ind. 400). Those cases merely make general statements that negligence and proximate cause must be pleaded.

The Indiana Supreme Court has expressly quoted and followed *Milwaukee etc. R. Co.* v. *Kellogg*, 94

U. S. 469 on the doctrine that proximate cause in a given case is not a law question but a fact question for the jury (*Cleveland, etc. R. Co.* v. *Powers,* 173 Ind. 105, 118). It is also the law of Indiana that a defendant is liable if his wrongful act was a "substantial factor" in producing the injury and: "It is the *function of the jury to determine* whether the defendant's act is a substantial factor in *producing* the injury of the plaintiff" (*Swanson* v. *Slagal, Adm.,* 1937, 212 Ind. 394, 413-414). Also, that where the defendant's negligence *concurs* with that of a third person in causing the injury, either or both are liable and the defendant cannot escape by setting up the third person's negligence, as the Courtof Appeals' opinion attempts to do (*Kraning* v. *Taggart,* 1936, 103 Ind. App. 62, 65). Also, that where the complaint directly alleges proximate cause, there is no "added" requirement of "showing" it, as the Court of Appeal's opinion argues (*Baltimore etc. R. Co.* v. *Petersen,* 156 Ind. 364, 373).

ARGUMENT.

Discussion.

It never should have been necessary for these twelve injured men to incur the delay and expense, or put this Court to the trouble, of coming here twice to obtain the supposedly simple and speedy relief of getting an answer and a jury trial on a question of fact.

While their amended complaint (Tr. 6-26) is somewhat long, due mainly to the fact that their twelve separate personal injury actions arising out of the same accident were ordered consolidated into one amended complaint (Tr. 6), it can be stripped of surplusage and alter-

native allegations and boiled down to one simple allegation of statutory negligence and one simple allegation of proximate cause and damage, so far as the present problem is concerned:

"(a) That when said public highway was closed, as aforesaid, and by reason of said facts the traffic was thereby obliged to make a detour around said closed highway, defendant at the time and place aforesaid, did not *display a red light* at said end or terminus of said closed highway and did not in addition to the barrier and in close proximity thereof have a red light installed and displayed in such manner as to be in plain view of any person including plaintiff approaching such barrier and did not have such light burning at the time and place of plaintiff's said accident which was between sunset and sunrise on the day aforesaid during which time such highway was closed to traffic *contrary to the statutory and mandatory provisions of the sections* 36-1605 *and* 36-1607, *Burns' Revised Statute*, 1933, being acts of 1921, Chapter 90, Sections 1 and 3, page 190. * * *" (Tr. 9).

* * *

"That all of the said injuries to each of the said plaintiffs *is the proximate result* of each and all of the acts of negligence of the defendant to the damage of each of said plaintiffs in the sum of: * * *" (Tr. 26, top).

It should require no prolonged struggle, up to the Supreme Court, to demonstrate that the above plain and direct statement of a personal injury claim is sufficient, at least as against a motion to dismiss, under the well-known provisions of Rule 8(a) and (e) which say that the complaint need only state a "claim for relief" which "shall be simple, concise and direct" and which may contain alternative statements of the claim in one count, and that the insufficiency of one alternative statement does not affect the sufficiency of the other.

However, the defendant filed a motion to dismiss for failure to state a claim, and in its motion attempted to argue the facts on proximate cause which ought to be argued to the jury at the close of the trial (Tr. 27). This motion to dismiss was sustained with prejudice (Tr. 29) which operates to cut off all remedy for the plaintiffs' injuries, both because it is an adjudication against them and because the Indiana two-year statute of limitations has run against them (Tr. 26) during their long struggle to get a hearing below,—unless they can get their amended complaint reinstated by the aid of this Court.

The facts concerning their accident and injury, and the theory on which they expect to prove the fact of proximate cause to the jury, are set forth in the first part of this petition at pages 3-4 and 6-7, though it seems scarcely necessary for this Court to anticipate and go into those fact questions at this stage.

These plaintiffs appealed to the Court of Appeals which dismissed their appeal at the behest of the defendant (Tr. 48) on the supposed technicality that it was not filed in time, without giving any consideration to the injustice which would result (Tr. 56). The plaintiffs petitioned this Court for certiorari, which was granted on a summary reversal commanding the Court of Appeals to discharge its duty under Amended Rule 86(b). (Tr. 62). Thus the plaintiffs finally obtained a hearing in the Court of Appeals.

The first part of the present opinion holds "we conclude that *it would work an injustice to plaintiffs* to invoke Amended Rule 73(b) against them" and that accordingly the appeal was timely filed and should not have been dismissed (Tr. 69).

Thus the present opinion admits that an injustice was inflicted upon these plaintiffs which was only cured by the intervention of this Court (Tr. 69).

But then the opinion goes ahead and reaches the result of again throwing these plaintiffs out of court by a long and involved factual argument to the effect that although the amended complaint contains a plain and direct allegation of proximate cause (Tr. 26), the Court of Appeals will brush this aside as a "conclusion" (Tr. 71, top), and that applying the "substantive" law of Indiana relating to code pleading, "*we find* no such causal relationship in the averments of the complaint now before us," (Tr. 72, top), that the court believes the proximate cause is something else than the defendant's negligence, (Tr. 73), and that the direct allegation of proximate cause is somehow destroyed by a supposedly conflicting allegation in another part of the complaint (Tr. 73-74).

The labored factual argument in the Court of Appeals' opinion seems to result from the Court's attempt to cut and trim this case to fit one of its earlier inapplicable decisions (Tr. 71-73). That case was brought by a man named *White* who is a stranger to the present case but was injured in the same collision. The Court of Appeals held that the defendant road contractor was under no duty to give warning of the presence of the trolley *pole* owned by the street railway company. But the present charge of statutory negligence for the defendant contractor's failure to place the statutory *red light* on his *own* barricade was not in the *White* case, and that opinion expressly *excluded* it, saying: "There was no complaint about the *barricades* or the *lights thereon.*" (*White* v. *White Consolidated, Inc.*, 7 Cir., 157 F. 2d 758, 759, 1st column). The present opinion admits

that the charge of statutory negligence, above quoted, under this red light statute, makes the *White* case "not decisive" in this case "for the plaintiffs have injected a new feature upon which they base negligence, which was not included in the complaint in the *White* case" (Tr. 71).

The opinion also admits and says the defendant likewise admits, that the defendant contractor's violation of Secs. 36-1605 and 36-1607, Burns Stats. 1933, the red light statute, "constitutes negligence *per se*" under the law of Indiana where the accident happened (Tr. 71). It is also the law in Indiana, as in most other jurisdictions, that if the defendant's negligence *concurs* with a third person's, such as the street railway company's, in causing the injury, the defendant cannot escape liability by laying the blame on the third person. The injured plaintiff may sue either or both. (*Kraning* v. *Taggart*, 1936, 103 Ind. App. 62, 65). Whether the defendant's negligence is a proximate cause of the injury in a given case "is the function of the jury to determine." (*Swanson* v. *Slagal, Adm.*, 1937, 212 Ind. 394, 413-414). Indiana follows and quotes this Court's doctrine in *Milwaukee R. Co.* v. *Kellogg*, 94 U.S. 469, 474, that whether proximate cause exists is a fact question for the jury, not a law question for the court. (*Cleveland, etc., R. Co.* v. *Powers*, 173 Ind. 105, 118). The statute and cases cited in this paragraph are the only Indiana substantive law involved in this case. No labor on it appears necessary because it is in effect admitted in the opinion.

But then the opinion goes ahead and saves the defendant contractor from liability by first disregarding the direct charge of proximate cause (Tr. 26) as being a "conclusion" and then laboring to demonstrate that

in fact the trolley company's negligence was the sole proximate cause and that the defendant's negligence was not a proximate cause, (Tr. 73-74). Thereby, the Court of Appeals brings these plaintiffs back under the doctrine of the *White* case and throws them out of court.

The opinion shifts its ground at least three times in the confused manner characteristic of arguments which seek to sustain a preconceived conclusion (though of course not deliberately, we assume):

First, it applies the "substantive" law of Indiana on how to *plead* a good "cause of action," (Tr. 71-72).

Second, it lays down the doctrine that although the plaintiffs have charged negligence, proximate cause and damage, there is an "added" requirement that the complaint must "show" that there is a "cause and effect relation" between the negligence and damage (Tr. 73). Since this very fact was plainly and directly alleged (Tr. 26) and was brushed aside by the opinion as a "conclusion" (Tr. 71, top), this "added" requirement is that the plaintiffs must convince the Court of Appeals of the fact of proximate cause before the Court will *let* them submit the fact question to a jury (Tr. 73).

Third, it holds (Tr. 73-74) that the supposed conflict of an alternative allegation of proximate cause in another part of the amended complaint (Tr. 12) destroys the effect of the good allegation of proximate cause (Tr. 26). (Actually there is no fatal conflict or admission, since the alternative allegation gives *two* proximate causes,—the *pole* and the lack of the statutory *red light* (Tr. 12, 73). But if there were conflicting allegations of proximate cause, this is expressly authorized by Rule 8(e).)

I.

Invasion of Province of the Jury.

What we have here is an invasion of these petitioners-plaintiffs' right to have *the facts* of this law case determined by a jury under the Seventh Amendment, *but the invasion masquerades under the appearance of a mere procedural ruling* on the sufficiency of the complaint. The invasion is accomplished *by means* of distorting the rules of civil procedure, but the *basic question* is not a mere procedural one. It is a case where *the right to jury trial has been cut off at the threshold.*

In the following recent case this Court prevented a similar but less arbitrary invasion of the right to jury trial where the district court dismissed the complaint at the close of plaintiff's evidence, which was affirmed by the Court of Appeals and reversed by this Court:

> "The right of jury trial in civil cases at common law is a *basic and fundamental feature of our system* of federal jurisprudence which is protected by the Seventh Amendment. A right *so fundamental and sacred* to the citizen, whether guaranteed by the Constitution or provided by statute, *should be jealously guarded by the courts.*" (Our emphasis)
>
> *Jacob* v. *City of New York* (1942), 315 U. S. 752, 753, 62 S. Ct. 854

The following case involved a similar invasion of the right to jury trial by the Utah Supreme Court, wherein that court argued the plaintiff out of court on fact questions, though it was done less arbitrarily than here, because plaintiff was at least permitted to put in his evidence, after which there was a directed verdict which was affirmed on appeal by the Utah Supreme Court and reversed by this Court on certiorari. The following lan-

guage of this Court is strongly applicable to the erroneous factual arguments in the present opinion hereunder review:

> "In reaching its conclusion as to negligence, *a jury is frequently called upon to consider many separate strands of circumstances,* and from these circumstances to draw its ultimate *conclusion* on the issue of negligence. Here there are many *arguments* that could have been presented to the jury in an effort to persuade *it* that the railroad's conduct was not negligent, and many counter arguments which might have persuaded the jury that the railroad was negligent. The same thing is true as to whether petitioner was guilty of contributory negligence. *Many of such arguments were advanced by the Utah Supreme Court* to support *its* findings that the petitioner was negligent and that the railroad was not. But the arguments made by the State Supreme Court are relevant and appropriate only for consideration by the *jury,* the tribunal selected to pass on the issues. For these reasons, the trial court should have submitted the case to the jury, and it was error for Utah Supreme Court to affirm its action in taking the case from the jury." (Our emphasis).
>
> *Wilkerson* v. *McCarthy* (1949), 336 U. S. 53, 63-64, 69 S. Ct. 413, 418

The above doctrine relating to negligence has been specifically applied by this Court, and many lower federal courts, to forbid the invasion of the province of the jury on the closely related subject of *proximate cause*:

> "The true rule is that what is the proximate cause of an injury is ordinarily a *question for the jury;* It is not a question of science or of *legal* knowledge. It is to be determined as a *fact,* in view of the *circumstances* of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a

force applied to the other end, that force being the proximate cause of the movement, as in the oft cited case of the squib thrown in the market place. *Scott* v. *Shepherd,* (Squib Case), 2 W. Bl. 892." (Our emphasis).

Milwaukee & St. Paul Ry. Co. v. *Kellogg* (1876) 94 U. S. 469, 474, 24 L. Ed. 256, 259

"But this conclusion (lack of proximate cause) rested upon *inferences* from facts within the *exclusive* province of the *jury,* and which *could not be drawn by the court* contrary to the verdict of the jury without *usurping* the functions of that fact finding body. Whether the unlawful acts of respondents or conditions apart from them constituted the *proximate cause* of the depreciation in value was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.' *Milwaukee, etc. Railway Co.* v. *Kellogg,* 94 U. S. 469, 474, 24 L. Ed. 256. And the finding of the jury upon that question must be allowed to stand, unless *all* reasonable men, exercising an unprejudiced judgment, would draw an *opposite* conclusion from the facts." (Our emphasis).

Story Parchment Co. v. *Patterson Parchment Paper Co.* (1931), 282 U. S. 555, 566, 51 S. Ct. 248, 252

The following case, though brought for damages under the Anti-Trust Act rather than damages for personal injury, is closely in point on the present situation because the District Court dismissed the complaint on the same ground and used the *same reasons and language* which the Court of Appeals uses in our case. We quote first the District Court's reasons and language as summarized by the Court of Appeals and then the latter court's response thereto in reversing the case:

"But assuming that the complaint was sufficient to charge the acts prohibited and that the assignments

to appellant were valid, he (district judge) was of the opinion that the complaint should be *dismissed* on two grounds: (1) Because appellant had not (40 F. Supp. 897, 906) '• • • alleged facts *showing* damage to the business or property of its assignors in an amount susceptible of expression in figures, *proximately resulting* from the alleged illegal acts'; and (2) because '• • • the necessary *causal relationship* between the alleged violations of the statutes and the alleged damage to plaintiff's assignors, *does not appear*'. For the reasons stated the district judge was of the opinion that appellant had 'failed to state a *cause of action* upon which relief can be granted it'" (131 F. 2d at p. 421 bottom). (Our emphasis).

In response to the above ruling of the District Court, the Court of Appeals made the following statement which we believe is closely applicable here:

"It may be that the conclusions drawn by the district judge will prove correct when the *evidence* is in, but they are of a character usually to be drawn from the *evidence* after a hearing and *not from the bare allegations of the pleadings*. One of the issues which appellant in this case sought to submit to the test of proof, was whether damage claimed had been sustained as the *proximate result* of the unlawful acts of the appellees charged in the complaint. Usually conclusions of this character rest upon *inferences from facts* within the *exclusive* province of the *jury*, and cannot be drawn until the evidence is in. *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 560, 51 S. Ct. 247, 75 L. Ed. 544.

"This court frequently has commented upon the considerations which should govern in ruling upon a *motion to dismiss* a complaint for insufficiency of statement. It is unnecessary to repeat here what the court has said on many occasions, particularly in the case of *Leimer* v. *State Mutual Life Assurance Co.*, 8 Cir., 108 F. 2d 302, in which reference is made

to many of the pertinent decisions of this court. It is enough to observe, as was done in the *Leimer* case, that no *matter how improbable it may be that the plaintiff can establish the allegations* of its complaint, it is, nevertheless, *entitled to the opportunity* to make the attempt."

Louisiana Farmers Protective Union v. *Great A. & P. Tea Co.* (8 Cir. 1942), 131 F. 2d 419, 422, pars. 8 and 9

II.

Distortion of the Court Procedure as the Means of Invading the Province of the Jury.

As already pointed out, the distortion of the procedural requisites of a complaint in this case is only the *means* by which the Court of Appeals commits the more basic error of cutting off at the threshold the plaintiffs' constitutional right to have a jury determine the *fact* as to whether there was proximate cause between the defendant's admitted negligence and their injuries.

However, the unreasonable and erroneous requirements which this opinion and decision fasten upon the pleading of personal injury complaints, in violation of the letter and spirit of Rule 8(a) and (e) of Civil Procedure, are sufficient in themselves to warrant the attention of this Court, lest the practice be perverted in the Seventh Circuit by this precedent contrary to that prevailing in the other circuits.

A.

Stripped of surplusage and alternative allegations, the amended complaint plainly and directly charges statutory negligence (Tr. 9), proximate cause and damage (Tr.

26). This meets the simple requirements of Rule 8(a) and (e) and also Form 9 appended to the Rules of Civil Procedure:

"The Rules of Civil Procedure *do not require* that a plaintiff shall plead *every fact essential to his right to recover* the amount which he claims. The requirement is 'a short and plain statement of the claim showing that the pleader is entitled to relief', and 'a demand for judgment for the relief to which he deems himself entitled.' Rule 8(a) (2) and (3), 28 U.S.C.A. following sec. 723(c). The appendix of forms accompanying the rules illustrates *how simply a claim may be pleaded and with how few factual averments.* This Court has consistently *disapproved* of the practice of *terminating litigation,* believed to be without merit, by the *dismissal* of complaints for informality or *insufficiency* of statement. See *Leimer* v. *State Mutual Life Assurance Co.,* 8 Cir., 108 F. 2d 302, 305. If it is *conceivable* that, under the allegations of his complaint, a plaintiff can, *upon a trial,* establish a *case* which *would* entitle him to the relief prayed for, a *motion to dismiss* for insufficiency of statement *ought not* to *be granted.*" (Our emphasis).

Sparks v. *England, et al.* (8 Cir. 1940), 113 F. 2d 579, 581 bottom

"The appendix of forms accompanying the rules illustrates how *simply and informally* a *claim* may be pleaded and *how few factual averments* are required for *initiating* a suit. * * *

"In view of the means which the Rules of Civil Procedure afford a defendant to obtain a speedy disposition of a claim which is without foundation or substance, by either securing a more definite statement or a bill of particulars under Rule 12 (e) and thereafter applying for judgment on the pleadings under Rule 12(h), (1), or by moving for a summary

judgment under Rule 56, we think there is *no justification for dismissing a complaint* for insufficiency of statement, *except* where it appears to a *certainty* that the plaintiff would be entitled to no relief *under any state of facts* which *could be proved* in support of the claim." (Our emphasis).

Leimer v. *State Mutual Life Assurance Co.* (8 Cir. 1940), 108 F. 2d 302, 305, 306

Since the adoption of the Federal Rules, however, the *theory* of pleading in the federal courts has been *completely changed.* Whereas, previously, it was the purpose of the pleadings to *set forth the facts* with particularity so that the *issues* to be tried could be defined, their purpose is now merely to *apprise the adverse party of the nature of the pleader's claim* or defense. 1 Moore's Federal Practice, 546 *et seq."*

In re: *Stroh* (D.C. M.D. Pa. 1943), 52 F. Supp. 958, 961

"Under the Federal Rules of Civil Procedure detailed pleading is seldom required. According to the illustrative form of a Complaint for Negligence, 28 U.S.C.A. following section 723c, Appendix of Forms, *Form 9,* it is *only* necessary to allege that defendant acted negligently and *as a result,* the plaintiff was injured." (Our emphasis)

Watson v. *World of Mirth Shows* (D.C. S.D. Ga. 1944), 4 F.R.D. 31,32

B.

The opinion attempts to engraft upon Rule 8(e) the "substantive" requirement of Indiana code pleading as to what is necessary to plead a "cause of action." It says:

That Rule 8 (e) authorizes pleading proximate cause as an ultimate fact seems obvious, but the Rule does not alter the *substantive* requirements that,

in *Indiana*, in an action for negligence, the *existence* of a *causal relationship* between the negligence charged and the damage alleged must be *shown* by *averments* of fact before the *complaint* can be said to state a *good cause of action. Baltimore & O. S. W. R. Co.* v. *Burtch*, 192 Ind. 199, 134 N. E. 858; *Indianapolis Abattoir Co.* v. *Neidelinger*, 174 Ind. 400, 92 N. E. 169. See also 45 C. J. 1093 and cases there cited. *We* find no *such* causal relationship in the averments of the complaint now before us. (Our emphasis.) (Tr. 71-72.)

This is emphasized on the next page where the opinion holds it is *not enough* to *charge* negligence, *proximate cause* and damage in the complaint. It says there is an "added" requirement:

> The plaintiffs have argued that "it suffices for us to show that there is at least one good charge of negligence, *a charge of proximate cause*, and a charge of damages." To this must necessarily be *added* that the charge of proximate cause must *show* a cause and result relation between that "one good charge of negligence" and the damages sustained by plaintiffs. *Baltimore & O. S. W. R. Co.* v. *Burtch*, 192 Ind. 199, 134 N. E. 858; *Indianapolis Abattoir Co.* v. *Neidlinger*, 174 Ind. 400, 92 N. E. 169. (Our emphasis). (Tr. 73).

The vice of the above engrafting of Indiana code practice and Indiana decisions upon Rule 8 is shown by the fact that the opinion uses that as an opening wedge and excuse for the court to go forward and usurp the functions of the jury by arguing that the plaintiffs have failed to "show" (to the Court of Appeals) the fact of proximate cause (Tr. 73-74).

This doctrine that the requirements of how to plead negligence and proximate cause in a complaint in federal

court, sufficient to withstand a motion to dismiss, is a "substantive" question of Indiana law, will, unless corrected, extend the doctrine of *Erie R. C.* v. *Tompkins*, 304 U. S. 64, so far into the procedural field as to throw most procedural questions back under state practice. At least it will encourage encroachments on the Rules of Federal Procedure and create needless confusion as to where is the dividing line between federal and state practice. The doctrine of this opinion has been repudiated in the other circuits:

> "The wrong and injury were done in Florida, and the court below was sitting in that state; but, although the local substantive law governs, *we are not bound by the Florida rule that pleadings are to be construed* most strongly against the pleader. This is the reverse of what was true before the Erie Railroad decision was rendered and before the Conformity Act, 28 U. S. C. A. sec. 724, was superseded by the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c." (Our emphasis).
>
> *Hannah* v. *Gulf Power Co.* (5 Cir. 1942) 128 F. 2d 930, 931 top

> "• • • the question of *whether the evidence makes an issue for a jury* is one to be determined by the Federal courts by their *own processes* of reasoning and conclusion, and not according to any rule or standard which may be fixed for doing it by statutes or decisions of a state. *Herron* v. *Southern Pacific Company*, 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857." (Our emphasis).
>
> *New York Life Ins. Co.* v. *Sparkman* (5 Cir. 1939) 101 F. 2d 484, 485

> "We are cited to a dictum to the contrary in a North Carolina decision; but in *matters of pleading we are governed no longer by the state practice*, but by the Federal Rules of Civil Procedure, 28 U. S. C.

A. following section 723c. Certainly the complaint here was sufficient under Rule 8 to justify submitting the evidence to the jury under a charge on the last clear chance doctrine. (See illustrative *form* 9 in appendix to rules). And if not sufficient, it could be amended to conform it to the evidence, even after judgment. Rule 15(b)." (Our emphasis).

Swift & Co. v. *Young* (4 Cir. 1939) 107 F. 2d 170, 172

Likewise, the "cause of action" test which the opinion borrows from Indiana practice and applies against these plaintiffs (Tr. 71-72) has been repudiated in other circuits:

"It would seem, however, that he has stated enough to withstand a mere formal motion, directed only to the face of the complaint, and that *here is another instance of judicial haste which in the long run makes waste.* Under the new rules of civil procedure, *there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,'* but only that there be a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" (Our emphasis).

Dioguardi v. *Durning* (2 Cir. 1944) 139 F. 2d 774, 775

"* * * inasmuch as it is only necessary to state a claim in the pleadings as against the defendant and *not a cause of action,* questions of what should be the *grounds of negligence* to be submitted to a *jury* should *not be determined by the court,* until the parties have had an opportunity to investigate by discovery and otherwise what are the facts surrounding the *situation* concerning which the complaint is made." (Our emphasis).

Mortensen v. *Chicago, Great Western Ry. Co.* (D.C. S.D. Ia. 1941) 2 F.R.D. 121

"The spirit of the new Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, is

to *simplify* procedure. They speak of *claims for relief* and *not causes of action.*" (Our emphasis).

Wright v. *Brush* (10 Cir. 1940) 115 F. 2d 265, 268

"There is *no requirement* that the complaint state 'facts sufficient to constitute a *cause of action.*' *Continental Collieries* v. *Shober*, 3 Cir. 130 F. 2d 631, 635; *Louisiana Farmers' Protective Union* v. *Great Atlantic & Pacific Tea Co.* 8 Cir. 131 F. 2d 419, 422; *Dioguardi* v. *Durning*, 2 Cir. 139 F. 2d 774, 775; *Garbutt* v. *Blanding Mines Co.*, 10 Cir. 141 F. 2d 679. The present complaint, tested by this simple criterion, is sufficient." (Our emphasis).

Camrel Co. v. *Skouras Theatres Corporation* (D.C. D. N.J. 1944) 57 F. 811, 812

While our charge of proximate cause (Tr. 26) is not a "conclusion" as the opinion erroneously argues as an excuse for disregarding it (Tr. 71, top), it would be sufficient if it were a conclusion:

"In construing Rule 8 of the New Rules of Federal Procedure, Mr. Alexander Holtzoff in his splendid text states: 'It *suffices to plead conclusions*, whether of fact or of law, provided the complaint is sufficiently definite so as to give fair *notice* to the opposite party of the precise *nature of the claim.* * * *' This is made the rule because of the liberal discovery provisions contained in other rules of federal procedure." (Our emphasis.)

Mails v. *Kansas City Public Service Co.* (D. C. W. D. Mo. 1943), 51 F. 562, 565 top.

While the error is serious, both on the invasion of the right to jury trial of fact questions and the perversion of the procedure under which the basic error masquerades, the case is at an early stage and it would suffice, if this Court sees fit, to remand summarily on this petition with-

out the necessity of bringing up the case for further briefing and oral argument, since the questions are sufficiently apparent from this petition.

Wherefore, petitioners respectfully pray that this Court may issue its writ of certiorari and bring up this case for review, or in the alternative, remand on summary order with instructions to the Court of Appeals to reverse and for the District Court to overrule the motion to dismiss.

Respectfully submitted,

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FILED
MAR 1 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 566

LOUIS MITCHELL, RALPH LIPSCOMB, JACK CROWLEY, FRED PETERS, CARL PHILLIPS MAUS, BABE W. BOWMAN, KENNETH OLSON, CLAYTON CASH, ARLING MARTYN, HERBERT STOWE, JOHN PEARSON SMITH, JR., SONNY DAWSON,
Petitioners,

vs.

WHITE CONSOLIDATED, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT, WHITE CONSOLIDATED, INC.

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Argument 6

A. Rule 38 (2) of this court sets forth what a petition for writ of certiorari should contain. It provides also that, "a supporting brief may be annexed to the petition or presented separately, but it must be direct or concise." Further this rule provides, "a failure to comply with these requirements will be sufficient reason for denying the petition"..... 6

B. Under the law of Indiana there was no duty upon the respondent to warn of a negligent condition created by a stranger to this case, namely the Gary Railways Company, who had failed to maintain warning of its trolley pole on a part of the highway under which respondent had no control 6

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IN THE

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vs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT, WHITE CONSOLIDATED, INC., IN OPPOSITION.

MAY IT PLEASE THE COURT:

I.

OPINIONS BELOW.

The opinion below in the case at bar (Tr. 68) is published as *Mitchell, et al.* v. *White Consolidated, Inc.*, 177 F. 2d 500.

The opinion below in a companion case brought by George White, another passenger in the bus with the plaintiffs in this case, is reported in *White* v. *White Consolidated*, 7 Cir. 157 F. 2d 758.

II.

STATEMENT OF THE CASE.

The petitioners are questioning the decision of the Court of Appeals in affirming the ruling of the District Court dismissing petitioners' case for failure to state a claim.

In their amended complaint petitioners undertook in much detail to charge the respondent with negligence resulting in injuries to the petitioners. The matter for decision by the District Court and the Court of Appeals, was whether the allegations contained in the amended complaint were sufficient to state a claim against the defendant. Both courts held the amended complaint failed to state a claim upon which any relief could be granted the petitioners.

In their amended complaint petitioners alleged that the defendant by contract with the Indiana State Highway Department, was resurfacing Broadway, a north and south State highway in the City of Gary. There were two street car tracks in the center of Broadway belonging to Gary Railway Company situated upon a concrete strip under franchise by the Railway Company. South of 23rd Avenue the trolley wires were supported by poles erected between the rails of the two sets of tracks. (Tr. 7.) The respondent at the time of the accident was resurfacing the west half of Broadway from the west curb to the west rail of the car tracks. (Tr. 8.) The defendant constructed a barricade across the west side of Broadway up to the west rail

of the street car tracks. The street car tracks were open for traffic. (Tr. 8 and 9.) Only the west side was under construction leaving the east side open for traffic. (Tr. 8-13.)

The petitioners were passengers in a bus early in the morning of July 1, 1941. The bus was traveling south on Broadway and approached the barrier at 23rd Avenue. The driver of the bus turned left to get around the barrier to proceed south on the street car tracks. (Tr. 8.) There was a trolley pole between the tracks and about 75 feet south of the barrier. (Tr. 10.) The driver of the bus turned left, passed around the barrier, drove southward in the middle of Broadway and ran into the Gary Railway Company's trolley pole 75 feet south of the barrier. (Tr. 12.)

In several places in the amended complaint the petitioners allege the respondent was negligent in failing to warn them that the trolley pole was unlighted, and not painted black and white as required by law. The principal allegation relied on by the petitioners as stating a claim, is the allegation that defendant failed to have a red light at the end of the barrier as required by an Indiana statute. Instead of the red light the amended complaint alleges the defendant had some bomb torches which consisted of a flickering, smoking, yellowish, open flame, which produced no red flame. (Tr. 9.)

It is not alleged or contended that defendant had any control over that part of the highway occupied by the Gary Railways Company. The allegations in the amended complaint show that respondent did not have control over the trolley poles, or that part of the street occupied by street car tracks. (See Tr. 8 and paragraphs VI, VII, XI, XII and XIII of amended complaint.)

III.

SUMMARY OF ARGUMENT.

A.

The Petition Does Not Comply With Rule 38.

Rule 38 (2) of this court sets forth what a petition for writ of certiorari should contain. It provides also that, "a supporting brief may be annexed to the petition or presented separately, but it must be direct and concise." Further this rule provides, "a failure to comply with these requirements will be sufficient reason for denying the petition."

B.

Plaintiffs' Complaint Does Not State a Cause of Action.

Under the law of Indiana there was no duty upon the respondent to warn of a negligent condition created by a stranger to this case, namely the Gary Railways Company, who had failed to maintain warning of its trolley pole on a part of the highway over which respondent had no control.

The defendant's only duty was to warn the plaintiffs of any dangerous conditions which had been created by it, and where the plaintiffs' injuries resulted from the collision of the bus in which they were riding with the trolley pole of the Gary Railways Company some distance away on premises for which defendant was nowise responsible, it was incumbent upon the plaintiffs to show that defendant's violation of the Indiana statute bore a causal relationship to the injuries sustained by them. The allegations of the complaint not only fail to do this but expressly neg-

ative the existence of any such relationship. Paragraph 20 of the complaint alleges: "That by reason of said pole being unpainted as aforesaid, unlighted, as aforesaid, and without any red lights or any warning devices on it whatsoever, as aforesaid, or without any warning signs or red lights warning him of danger ahead, as aforesaid, the driver of said bus was unable to see said pole or know of its presence or of the danger ahead in time to avoid hitting said pole."

Where a statute in Indiana required the respondent to maintain a red light upon its barrier at the traffic end of road resurfacing work being done for the highway department of the State of Indiana and the driver of a bus carrying petitioners, being warned of the barricade by other lights placed there by the respondent contractor, drove safely around it, there was no causal connection between the alleged violation and the damage resulting proximately from the negligence of the Gary Railways Company.

IV.

ARGUMENT.

A.

The Petition Does Not Comply With Rule 38.

Rule 38 (2) of this court sets forth what a petition for writ of certiorari should contain. It provides also that, "a supporting brief may be annexed to the petition or presented separately, but it must be direct and concise." Further this rule provides, "a failure to comply with these requirements will be sufficient reason for denying the petition."

The petitioners' petition and brief are one. It is impossible to tell which part constitutes the petition and which the brief. In fact, the entire pretended petition appears to be a brief and not a petition.

Petitioners have set out under "Statement of The Matter Involved", beginning on page 2 of their brief, matters in no way bearing on the question sought to be presented.

The violation of Rule 38 is flagrant. The petition should be denied because of the failure to comply with Rule 38. It should also be denied for lack of a meritorious question as hereinafter shown.

B.

The Plaintiffs' Complaint Does Not State a Cause of Action.

Under the statutes of Indiana it was the duty of the Gary Railways Company to maintain that portion of the highway occupied by it. (Section 36-2902 Burns 1933.)

It was the duty of the State Highway Department to pro-

vide a detour or run-around for traffic, while defendant was resurfacing the highway. (Section 36-142 Burns 1933.)

It is contended by petitioners that because the respondent did not have a red light on the end of the barrier, they were not warned of the unpainted and unlighted trolley pole maintained by the Gary Railways Company between its tracks 75 feet south of the barrier.

The respondent's position is that it was charged with the duty to protect the public from injury that might result from its action or lack thereof, regarding that part of the highway over which it had control. It was not charged with a duty to protect the public against the negligence of the Gary Railways Company.

The petitioner urges that since they alleged in their complaint that the failure to have a red light, required by law, at the end of the barrier, was the proximate cause of their injuries, the court could not determine as a matter of law, that such negligence could not be the proximate cause. Petitioners contend the question of proximate cause should be determined by the jury.

The petitioners contend, that having said that the failure to have a red light at the end of the barrier was a proximate cause, the court was bound to accept that allegation as presenting a jury question, notwithstanding other facts alleged clearly show it could not be a proximate cause.

The Court of Appeals held, that since under the law of Indiana there was no duty on the respondent to warn of the negligence of the Gary Railways in failing to properly maintain its pole on a part of the highway over which respondent had no control, the failure to maintain a red light at the end of its barrier, could not be a proximate cause of the plaintiffs' injuries.

Petitioners urge that it was negligence *per se* on the respondent's part when it failed to comply with the statute

requiring a red light at the end of the barrier. It is true that a violation of the statute is negligence *per se*. But it does not follow that the negligence is a proximate cause of petitioner's injuries. For example, it would be negligence *per se* in Indiana for a motorist to fail to have a red light at the rear of his automobile at night, but it would play no part in a head-on collision.

Petitioner's whose theme is that the court usurped the function of the jury. Generally the question of proximate cause is for the jury. But where it clearly appears, as it does from the amended complaint, that the negligence could not be a proximate cause it is then a question for the court.

The law in Indiana upon circumstances and facts almost identical with this case is stated in *Mahoney* v. *Sharp*, 86 Ind. App. 180 (page 184), 156 N. E. 566:

> "It is true that a contractor must protect the public against obstructions in the highway resulting from his work, but no duty aside from the statute can be imposed upon him to protect against obstructions placed by others."

In support of respondent's position we quote from *Prest-O-Lite Co.* v. *Skeel*, 182 Ind. 593, 601, 106 N. E. 365, as follows:

> "A violation of penal statutes constitutes negligence *per se*, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought. * * * The violation of a statute or ordinance raises no liability for an injury which another may have suffered, unless the injury was in some material degree the result of such violation."

In *Hayes Freight Lines* v. *Wilson*, ... Ind. ....., 77 N. E. (2d) 580, 585, the court said:

> "If there was no causal connection between the violation of the statute and the injuries sustained by the appellee, the violation of the statute could not be the

proximate cause of such injuries and the jury should not have been informed that they could consider the evidence of such violation for any purpose."

If every allegation of petitioner's amended complaint were proved on a trial before a jury, the court would be required to sustain a motion for directed verdict. This is so because the petitioners are seeking to charge respondent with a duty which the law says is not its duty.

The petitioners complain of being deprived of a jury trial. They complain of the arbitrary action of the Court of Appeals. Throughout petitioners' petition-brief, they infer a design from the inception of this litigation on the part of the Court of Appeals to deprive them of their day in court. They have had their days in court with studied consideration of their rights under the law as applied to the facts, which they intend to prove as stated in their complaint. Justice is not only had through consideration of facts by a jury but also by application of law to the admitted facts as pleaded.

Petitioners ignore the rights of respondent. Should respondent be put to the expense and trouble of a useless trial, a trial that can only proceed as far as the plaintiffs' evidence when it would then terminate in defendant's favor?

If petitioners' position is correct no complaint however insufficient can be dismissed for failure to state a claim.

The amended complaint clearly and definitely shows, that the facts relied upon by petitioners, to establish liability on the respondent, falls short of stating a claim because it appears there was no duty on respondent under the law to warn petitioners of the unlighted and unpainted trolley pole of the Gary Railways Company. Moreover, it is entirely clear that a red light at the barrier could not have been any more effective than the bomb torches used by

respondent in warning petitioners of the existence of trolley pole located a considerable distance below the barrier and on a portion of the road not under repair. Manifestly, there can be no causal relationship between respondent's failure to use a red light instead of the torches and the accident alleged in the complaint.

The Court of Appeals very properly sustained the District Court.

WHEREFORE, respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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